

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:23-cv-02822-SVW-MAA	Date	September 29, 2023
Title	<i>Andre Nesbit v. Sunrise Restaurants et al.</i>		

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz

N/A

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

N/A

N/A

Proceedings:

ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT DISMISS PLAINTIFF'S COMPLAINT [ECF No. 1] *SUA SPONTE* FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM

I. Introduction

Plaintiff filed his complaint on April 10, 2023. Compl., ECF No. 1. Defendants answered with a counterclaim on August 15, 2023. Answer, ECF No. 43. Plaintiff then moved to dismiss and moved for judgment on the pleadings on August 23, 2023. Pl.'s Mot. to Dismiss and for J. on the Pleadings, ECF No. 50. A hearing was set for October 2, 2023. For the reasons discussed below, that hearing is VACATED and Plaintiff is ORDERED to show cause why his case should not be dismissed by the Court *sua sponte*. Alternatively, Plaintiff may amend his complaint.

II. Review of Claims

A trial court may dismiss a claim *sua sponte* under Fed. R. Civ. P. 12(b)(6). *Seismic Reservoir 2020, Inc. v. Paulsson*, 785 F.3d 330 (9th Cir. 2015) (citing *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987)). To do so, the district court must give notice of its *sua sponte* intention to dismiss and provide the plaintiff with an opportunity to at least submit a written memorandum in opposition to such a

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motion. *Id.* (citing *Wong v. Bell*, 642 F.2d 359, 362 (9th Cir. 1981)).

A. First Claim for Fraudulent Misrepresentation

Plaintiff asserts fraud claims against Defendants under 18 U.S.C. § 1038 (False information and hoaxes). Title 18 of the United States Code is a federal criminal statute which does not create civil liability or a private right of action. *Carrow v. Roberts*, No. EDCV 21-1525 JGB (SHKx), 2022 U.S. Dist. LEXIS 80181, *12 (C.D. Cal. Jan. 3, 2022) (citing *ManorCare of Easton PA LLC v. Nagy*, 2017 U.S. Dist. LEXIS 161722, *4 (E.D. Pa. Sept. 29, 2017)). Even if there were a private right of action, § 1038 “is limited to hoaxes regarding a narrow range of military and infrastructure-related threats.” *Crook v. Shea*, No. EDCV 20-1154 JGB (SHKx), 2020 U.S. Dist. LEXIS 263107, *5 (C.D. Cal. Sept. 30, 2020) (citing *Jianjun Xie v. Oakland Unified Sch. Dist.*, No. No. C 12-02950 CRB, 2012 U.S. Dist. LEXIS 165205, 2012 WL 5869707, at *7 (N.D. Cal. Nov. 19, 2012)).

In summary, § 1038 does not give Plaintiff a private right of action. Therefore, the Court does not have jurisdiction to hear this claim. Moreover, the scope of § 1038 is limited to military and infrastructure-related threats. Even if Plaintiff did have a private right of action, he would have failed to state a claim under this statute because he has not alleged any misrepresentations relevant to the statute’s subject matter. For these reasons, the Court thinks this claim should be dismissed. Plaintiff is ORDERED to show cause why this is not the case.

B. Second Claim for Conspiracy to Violate Civil Rights

Plaintiff asserts that Defendants Sunrise Restaurants and EDD violated § 42 U.S.C. 1985(3) by forming a conspiracy to deprive him of his civil rights. To plead a claim for conspiracy to violate civil rights under this statute, a plaintiff must allege an agreement or meeting of the minds to violate constitutional rights. *Wood v. City of Santa Ana*, No. 8:18-00643 SVW (ADS), 2021 U.S. Dist. LEXIS 154215, 2021 WL 3524126, *6 (C.D. Cal. June 4, 2021) (citing *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2001)). Conclusory allegations of conspiracy are not sufficient to support a claim under § 1983. *Id.* (citing *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)).

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With regards to the meeting of the minds, Plaintiff's complaint is conclusory. The most that Plaintiff alleges is as follows:

It seems that there was collaboration between the two parties, but the EDD set up a second interview. There was an initial interview already, and the EDD changed the plaintiff's phone number and address, so that he would miss the letter for an interview and miss the phone call. This was done without the plaintiff's consent or knowledge. It seems to be done in collaboration with Sunrise Restaurants to cause the plaintiff harm.

These statements are not sufficiently particular to state a claim that a conspiracy was formed between the Defendants. For this reason, the Court thinks this claim should be dismissed. Plaintiff is ordered to show cause why this is not the case.

III. The Above Claims Are the Basis for Plaintiff's Alleged Federal Jurisdiction

Without the above claims, there is no federal jurisdiction for the Court to hear this case. If Plaintiff cannot show cause why these claims should not be dismissed, the Court will dismiss the case in its entirety.

IV. Conclusion

For the foregoing reasons, the court ORDERS Plaintiff to show cause why these claims should not be dismissed. Plaintiff shall respond within 21 days—by or on October 19, 2023. Plaintiff may also amend his complaint. The hearing set for October 2, 2023, is **VACATED**.

IT IS SO ORDERED.

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